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Leona Mary Hudak

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SEIZE, RUN, AND SUE:  
THE IGNOMINY OF INTERSTATE CHILD CUSTODY LITIGATION  
IN AMERICAN COURTS

by

Leona Mary Hudak\*

I. INTRODUCTION

For every three marriages solemnized in the United States each year, one divorce is granted. In some states the statistics approach one in two.<sup>1</sup> The most pernicious and tragic aspect of a broken American marriage involving children is the custody-visitation aftermath. Therein lies a serious indictment of the American juridical-legal-legislative system.<sup>2</sup> For with official recission of the nuptial contract, begin the often devious and vengeful machinations and maneuvers of noncustodian v. custodian—open to hearing and rehearing<sup>3</sup> in the courtrooms of 52 jurisdictions<sup>4</sup>—all masquerading in the guise of doing what is in the *best interest* of the child. If he or she is dissatisfied, the noncustodial parent need only hire an attorney, establish some “minimum contacts” with another state, transport the child there on his first “visitation” with him,<sup>5</sup> and the battle is on!

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\*Assistant Professor of Law, University of Missouri-Kansas City; BA, Case Western Reserve University; MA, MALS, University of Wisconsin; JD, LL.M., Cleveland State University, Cleveland-Marshall College of Law.

1. In 1972 there were 2,269,000 marriages and 839,000 divorces in the United States. *WORLD ALMANAC AND BOOK OF FACTS*, 1973, at 1016 (c. 1974). In California in 1972 there were 173,563 marriages and 111,162 divorces; a ratio of nearly one to one.

2. Hazard, *May v. Anderson: Preamble to Family Law Chaos*, 45 VA. L. REV. 379 (1959). “[T]he struggle between divorced spouses over the custody of their children has transcended the brutality and irregularity of guerrilla warfare.” *Id.* at 392.

3. In *Munroe v. Munroe*, 47 Wash. 2d 391, 287 P.2d 482 (1955), during a 3-year period, the divorced husband and wife filed between 20 and 30 contempt actions against each other. In *Hixson v. Hixson*, 199 Ore. 559, 263 P.2d 597 (1953), the ex-husband filed between 60 and 70 documents in regard to custody after the divorce. See Davis, *Children of Divorced Parents: Sociological and Statistical Analysis*, 10 LAW & CONTEMP. PROB. 700, 708 (1944), wherein it says that after a divorce, the child can serve as a convenient instrument through which former spouses can express their mutual resentment.

4. This includes the 50 states, the District of Columbia, and Puerto Rico. In *Crowell v. Crowell*, 184 Ore. 467, 198 P.2d 992 (1948), for example, a habeas corpus action, the Oregon Supreme Court had to choose between the enforcement of 5 decrees made at various times in Oklahoma and Texas courts. In *Allen v. Allen*, 200 Ore. 278, 268 P.2d 358 (1954), a son and daughter of tender years were subject to 7 separate custodial contentions between their parents in 9 years in the courts of Oklahoma, California, and Oregon.

5. Denial of visiting privileges with the noncustodial parent is virtually unknown, unless he or she is a pervert, habitual criminal, drug addict, alcoholic,

Often lasting for the duration of the child's non-age, it is nurtured by jurists, social workers, and child psychiatrists and psychologists.<sup>6</sup>

One writer noted that there were approximately nine children in the families of every ten persons granted divorces and about one third of a million children whose parents got divorces each year in the United States. In about 90 percent of these cases custody of the children is awarded to the mother.<sup>7</sup> Regardless of the statutory language as to the equality of parental rights, the mother because of the "mystique of motherhood" has an advantage which is decisive, especially with children under 12—unless she is clearly shown to be unfit.<sup>8</sup> Frequently, irreconcilable disputes develop over visitation—and often custody—irrespective of who is granted custodianship.

The unprecedented mobility of Americans during and after World War II and the increasing rate of family breakup and other social changes in the 1950's and 1960's have accentuated the problem. Serious complications dealing with unresolved jurisdictional conflicts arise when the litigation crosses state lines—with competition between courts being added to competition between claimants.<sup>9</sup> Professor Hazard deplored this reproachful

or has been declared mentally incompetent, *Godbey v. Godbey*, 70 Ohio App. 450, 44 N.E.2d 810 (1942); *but see* *Friedland v. Friedland*, 174 Cal. App. 2d 874, 345 P.2d 322 (1959); Annot., 88 A.L.R.2d 207-08 (1963).

6. In case No. 247774, Juvenile Court, Cuyahoga County, Ohio, 1968, the caseworker, in the face of an overwhelmingly positive investigation favoring the mother, apparently acting under the court's instructions, threatened the mother with loss of custody of her 3-year-old son if she did not dismiss her application to restrict the father's visiting rights to Cuyahoga County, Cleveland, Ohio. When the mother sought relief through the court's chief psychiatrist, he refused to acknowledge, in his professional capacity, that subjecting a child of that age to annual 2-month visits 2000 miles away from home and to further unnecessary litigation in another state was contrary to the best interests of the minor, although he avowed this position privately and socially.

7. P. SIMON, *STEPCHILD IN THE FAMILY* at 77-78 (1964).

8. Oster, *Custody Proceedings: A Study of Vague and Indefinite Standards*, 5 J. FAM. L. 21, 29 (1965). *See e.g.*, *Horst v. McLain*, 466 S.W.2d 187 (K.C. Mo. App. 1971).

9. Ingenuously, this exigency has been described as: "the law of the jungle" bringing "misery to countless children of divorce and other broken homes," Bodenheimer, *The Uniform Child Custody Jurisdiction Act*, 3 FAM. L.Q. 304, 306 (1969); "where possession apparently is not merely nine points of the law but all of them and self-help the ultimate authority . . ." May v. Anderson, 345 U.S. 528, 539 (1929) (Justice Jackson dissenting); and "where the child loses his home, not because of any urgent necessity from the standpoint of the care he receives, but to satisfy the urge to continue the marital discord at its most vulnerable point . . . the competition for the affection and control of the children." Bodenheimer, *supra* at 305.

Justice Rutledge concurring in *New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947), wrote:

" . . . the effect of the decision may be to set up an unseemly litigious competition between the states and their respective courts as well as between parents. Sometime, somehow, there should be an end to litigation in such matters."

*Id.* at 620.

condition over a decade ago. He characterized the "parental right of custody" as not worth the paper on which it is written,"<sup>10</sup> and he proceeded even more graphically:

The child is filched from classroom, playground, public street, or his home, transported out of the state and perhaps across the country by the abducting parent, there to be held pending a counter-foray by the other parent. Meanwhile each parent recruits the assistance of his home court, sometimes of courts elsewhere, seeking by various procedures to strengthen his grip on the child and to loosen that of the other parent.<sup>11</sup>

Few courts have dealt with the dire problem positively and only five state legislatures have.<sup>12</sup> The United States Supreme Court has avoided deciding the issue, thus withholding all federal controls from interstate custody law.<sup>13</sup>

As the Reporter for the Special Committee of the Commissioners on Uniform State Laws has noted, when there has been one upheaval in a child's life because of divorce or some other ill fate, what the child needs most is "stability, security, and continuity."<sup>14</sup> Dr. Andrew Watson, psychiatrist and professor of law, deems stability "practically the principal element in raising children, especially pre-puberty ones"; and he maintains that "a child can handle almost anything better than he can handle instability."<sup>15</sup>

A growing child's need for stability of environment and constancy of affection, especially when subjected to the trauma of a disintegrated home, seems today a well-accepted fact, verifying old truths gathered from long experience of mankind . . . custody decisions once made "should nearly always be permanent and irrevocable."<sup>16</sup>

Dr. Herbert Modlin of the Menninger Foundation emphasizes the "constancy of mothering" and the persistence of "the requirement of continuity and a sense of family, satisfying a need to belong,"<sup>17</sup> irrespective of the

10. Hazard, *May v. Anderson: Preamble to Family Law Chaos*, 45 Va. L. Rev. 379, 395 (1959).

11. *Id.* at 392-93.

12. The Uniform Child Custody Jurisdiction Act has been adopted in four states. See note 187 *infra*.

13. Thus far in its history, the United States Supreme Court has dealt with four child custody cases on certiorari: *Ford v. Ford*, 371 U.S. 187 (1962); *Kovacs v. Brewer*, 356 U.S. 604 (1958); *May v. Anderson*, 345 U.S. 528 (1953); *New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947); In all four cases the Court evaded the issue of a state giving full faith and credit to a custody decree of a sister state.

14. Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1208 (1969).

15. Proceedings of Special Committee on Uniform Divorce and Marriage Act, National Conference of Commissioners on Uniform State Laws, at 98, 101 (Dec. 15-16, 1968); A. WATSON, *PSYCHIATRY FOR LAWYERS* 159, 197 (1968). For a review of the book's effect on American courts see *Time*, Sep. 30, 1974, at 65.

16. A. WATSON, *supra* note 15, at xi-xii, 197.

17. 1963 Proceedings, Section of Family Law, American Bar Association in H. FAIN, *READINGS IN LAW AND PSYCHIATRY* 319-22 (1968).

other needs of the various growth periods. Professor Homer Clark, concurring with Drs. Watson and Modlin, deplores the transferral of a child from one parent to another by conflicting court decrees.<sup>18</sup>

In 1963 the American Bar Association at its annual conference heard this warning voiced:

The manner in which the courts deal with these victims of domestic catastrophe has an impact, directly or indirectly, on a substantial proportion of our people. It presents a challenge to the stability of our social institutions and is assuming threatening significance.<sup>19</sup>

A decade later, in 1973, Professors Joseph Goldstein and Albert Solnit of Yale University, and Dr. Anna Freud of the Hampstead Child-Therapy Clinic, London, England, published their study *Beyond the Best Interests of the Child*—decrying the role American courts play in mishandling dependent children. While their findings dealt primarily with adopted and foster children, the authors made the following observations about custody in divorce and separation:

. . . The absence of finality coupled with the concomitant increase in opportunities for appeal are in conflict with the child's need for continuity. . . . In addition certain conditions such as visitations may themselves be a source of discontinuity. . . . Loyalty conflicts are common and normal under such conditions and may have devastating consequences by destroying the child's positive relationship to both parents. . . .

Once it is determined who will be the custodial parent, it is that parent, not the court, who must decide under what conditions he or she wishes to raise the child. Thus, the *noncustodial parent should have no legally enforceable right to visit the child*, and the custodial parent should have the right to decide whether it is desirable for the child to have such visits. What we have said is, to protect the security of an ongoing relationship—that between the child and the custodial parent.<sup>20</sup>

Yet—in the light of these insights and realities—contemporary law and judicial practice relating to child custody and visitation are an antithesis that shocks the conscience!

## II. AMERICAN CHILD CUSTODY LAWS

### A. Development of English Child Custody Laws

Under the old Persian, Egyptian, Greek, Gallic, and Roman law, the father had absolute power over his children. Infanticide was legal, as was the selling of sons and daughters into slavery, on the theory that he who gave could also take away. In ancient Rome this power did not cease upon

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18. H. CLARK, *THE LAW OF DOMESTIC RELATIONS* 326 (1968).

19. H. FAIN, *supra* note 17, at 316.

20. J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 37-38 (1973) (emphasis added). For a review of the book's effect on American courts see *TIME*, Sep. 30, 1974, at 65.

the child's attainment of majority, but continued for the life of the *pater familias*.<sup>21</sup>

In feudal England custody was automatically an incident of guardianship of lands. Only gradually did it come to be regarded as a trusteeship with responsibility toward the child.<sup>22</sup> The Court of Wards and Liveries, established during the reign of Henry VIII, developed some measure of protection for children. A 1660 statute transferred jurisdiction over them to the chancery courts, which assumed the Crown's prerogative of *parens patriae* to care for infants.<sup>23</sup>

At English common law the mother had no rights in regard to her children; she was entitled only to reverence and respect. The father had full authority over and custody of the children. These rights flowed from his duties of maintenance, care, education, and control. While the former were easily executed by courts, enforcement of the latter—then, as today—presented insuperable difficulties and insoluble problems, which gradually led to an erosion of paternal authority, subject to centuries of stubborn challenge.

In 1837, Mr. Serjeant Talfourd described the pathos of the mother if her husband chose to abandon her:

Not only may she be prevented from bestowing upon them [her children] in their early infancy those solitudes of love for the absence of which nothing can compensate—not only may she be prevented from tending upon them in the extremity of sickness, but she may be denied the sight of them; and if she should obtain possession of them by whatever means, may be compelled by the writ of habeas corpus to resign them to her husband or his agents without condition—without hope. That is the law . . . and how is it enforced? By process of contempt, issued at the instance of the husband against his wife, for her refusal to obey it, under which she must be sent to prison, there to remain until she shall yield or until she shall die.<sup>24</sup>

In 1839 Parliament altered child custody law by providing that, upon the petition of the mother, the Lord Chancellor and Master of the Rolls might at his discretion enter an order allowing the mother access to her children or, if the child was under the age of seven years, giving the mother custody until they attained that age, subject to any regulations deemed convenient and just. The order was enforceable by a contempt action. The only absolute bar to the mother's petition for custody was a conviction of adultery in an action brought by her husband or by a similar sentence issued by an ecclesiastical court.<sup>25</sup>

21. W. BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND, 451 (T. Cooley 3d ed. 1884); 2 J. KENT, COMMENTARIES ON AMERICAN LAW, 204-05 (11th ed. 1867).

22. A. JACOBS & J. GOEBEL, CASES ON DOMESTIC RELATIONS 880-82 (4th ed. 1962).

23. Foster & Freed, *Child Custody*, 39 N.Y.U.L. REV. 442 (1969).

24. 39 PARLIAMENTARY DEBATES, at col. 1082 (3d ser. 1837).

25. 2 & 3 Vict., c. 54 (1839).

The Act of 1873 extended the period during which infants might remain in their mother's custody to the age of sixteen years.<sup>26</sup> The Guardianship of Infants Act of 1925 at long last established the welfare of the child as the paramount consideration in determining its custody.<sup>27</sup> The Child and Young Persons Act of 1933 provided that a parent or guardian could be deprived of a child's custody if he or she were found unfit or unable to fulfill his or her parental responsibilities.<sup>28</sup>

### B. *Early American Child Custody Laws*

James Kent, Chief Justice and Chancellor of the New York Supreme Court and Professor of Law at Columbia University, in his *Commentaries* noted that the father's duty to maintain and educate his children during their minority was absolute, but the obligation to support did not extend to the mother. In consequence thereof, the father was generally entitled to the custody of their persons and to the value of their labors and services. This was an absolute right until the children reached at least the age of fourteen—and by inference of the law—until they reached the age of twenty-one.<sup>29</sup>

If his children were improperly detained, a father could regain their custody by suing out a writ of habeas corpus. Courts of law and equity would then investigate the circumstances and the inclinations of the infants and, utilizing sound discretion, place a child where they deemed best, which sometimes meant retention of control by third persons, particularly where the morals, safety, or interests of the infants demanded it. On a father's death, the mother's right to custody was superior to that of others.<sup>30</sup>

One of the earliest American cases to consider the matter of child custody was *Commonwealth v. Addicks*.<sup>31</sup> Involved were two girls aged seven and ten. About four years prior to the filing of the suit, the father, Joseph Lee, had become financially embarrassed and was unable to support his family. The mother, Barbara Addicks, kept a boardinghouse, using the proceeds to maintain and educate her children. A minor son had continued to live with Lee. Following her abandonment by Lee, she assumed a relationship with Addicks, whom she married after Lee obtained a divorce from her in 1813. Pennsylvania law<sup>32</sup> forbade a spouse guilty of adultery from marrying the paramour during the lifetime of the former husband or wife. Lee petitioned for a writ of habeas corpus on grounds of Barbara's immoral conduct and that his improved circumstances enabled him to

26. 36 & 37 Vict., c. 12.

27. 15 & 16 George V, c. 45.

28. 23 George V, c. 12, §§ 61 & 62.

29. 2 J. KENT, *supra* note 21, at 190-94.

30. *Id.* at 194, 203-05.

31. 5 Binney's Reports 519 (Pa. S. Ct., 1813).

32. Act of September 19, 1785, ch. MCLXXVI, § 7, 2 Laws of the Commonwealth of Pennsylvania 343 (1810).

support the children. There were no allegations of unfitness against the mother.

Chief Justice Tilghman of the Pennsylvania Supreme Court utilized the rationale which later came to be called the "best interests of the child" doctrine. Although he expressed disapprobation of the mother's conduct, he observed that she had taken good care of the girls in all respects. In consideration of this and their tender age, he concluded that they stood in need of assistance which could be provided by none so well as a mother. Exercising his discretion, he continued custody in the mother, with visiting privileges accorded the father.

By contrast, in *People ex rel. Barry v. Mercein*,<sup>33</sup> the New York Supreme Court retrogressed in utilizing the "paramount right of the father" doctrine. One Eliza Anna Mercein, of New York City, married John Barry of Nova Scotia, in 1835. The family moved back and forth several times. Finally, in 1838, Barry decided to remain in his native land. He took with him four children of a previous marriage and the couple's son. In 1839 he sought by habeas corpus the custody of their 19-month old daughter. On the fifth writ he succeeded. The Court of Correction of Errors reversed in 1840, by a vote of 19 to 3,<sup>34</sup> only to be reversed by the Supreme Court on a sixth writ in 1842.<sup>35</sup> Justice Bronson described the superior claims of the father as "the law of the land . . . in accordance with law of God,"<sup>36</sup> although he admitted that such laws might not have "kept pace with progress of civilization."<sup>37</sup>

In 1881, in the case of *Chapsky v. Wood*,<sup>38</sup> Justice Brewer of the Kansas Supreme Court for the first time expressed in the United States what is termed the "best interests of the child" doctrine. He held that irrespective of the issues of the case and the rights of others, the paramount consideration before the court was: "What will promote the welfare of the child?" Plaintiff father sought possession of his five-and-a-half-year-old daughter whom he had gifted to his wife's sister at birth—the mother being too ill to care for her—while he satisfied his wanderlust. In a unanimous decision the Kansas tribunal continued custody in the maternal aunt, observing:

. . . an affection for the child is seen in Mrs. Wood that can be

33. 3 Hill 399 (N.Y. Sup. Ct. 1842).

34. 25 Wend. 64 (Ct. for the Correction of Errors 1840).

35. 3 Hill 399 (N.Y. Sup. Ct. 1842).

36. *Id.* at 422-23. This is in marked contrast to the Chancellor's opinion in the Court of Errors expressing:

. . . the mother is the most proper person to be entrusted with the custody of a child of this tender age . . . "the law of nature had given to her an attachment for her infant offspring which no other relative will be likely to possess in an equal degree. And where no sufficient reason exists for depriving her of the care and nurture of her child, it would not be a proper exercise of discretion in any court to violate the law of nature in this respect."

*People v. Mercein*, 25 Wend. 64, 106 (Ct. for the Correction of Errors 1840).

37. 3 Hill 399 at 422 (N.Y. Sup. Ct. 1842).

38. 26 Kan. 650 (1881).



found nowhere else. And it is apparent, that so far as a mother's love can be equaled, its foster-mother has that love, and will continue to have it.<sup>39</sup>

An unfortunate milestone in child custody litigation history was reached in 1905 by the New York County, New York, Supreme Court, in the case of *People ex rel. Sinclair v. Sinclair*,<sup>40</sup> when it arbitrarily decided that a five-year-old boy was no longer of such tender age that he needed maternal love and care. The "paramount right of the father" doctrine prevailed, as Judge Bischoff reversed the mother's custody decree, citing the *Barry-Mercein* case, and holding that the attainment of such age constituted a sufficient change of condition to warrant the action.<sup>41</sup>

Not all states were as blind to the needs of infants as was New York. Kansas<sup>42</sup> and Oregon<sup>43</sup> statutorily gave both parties equal rights to custodianship of their children before the turn of the century. Many others eventually followed suit.<sup>44</sup>

### C. The United States Supreme Court and Child Custody

Our highest tribunal has considered the issue of custody and the interstate child only four times in its history. *People ex rel. Halvey v. Halvey*<sup>45</sup> came before it in 1947. The Halveys were married in 1937. In 1944, without her husband's consent, Mrs. Halvey and their young son went to Florida to establish residence. In 1945 she filed for divorce there. Mr. Halvey, served by publication, made no appearance. The day before the decree awarding Mrs. Halvey a divorce and permanent care, custody, and control of the child was granted, Mr. Halvey secreted his son back to New York. Thereafter, Mrs. Halvey brought a habeas corpus in a New York Supreme Court, challenging her former spouse's detention of their child.<sup>46</sup>

Following a hearing, the New York court ordered that custody was to remain in the mother, but it was subject to visiting rights in the father which included having his son with him during a certain vacation period each year. Further, Mrs. Halvey was ordered to file a \$5,000 bond, conditioned on her delivering up the child to the father in Florida each year. The order was subsequently affirmed by all courts,<sup>47</sup> including the United States Supreme Court on certiorari. Justice Douglas wrote the opinion, utilizing the rationale that full faith and credit did not have to be given to the Florida decree. Since Florida could modify the custody decree, the

39. *Id.* at 657.

40. 95 N.Y.S. 861 (1905).

41. *Id.* at 862.

42. KAN. CONST., art. 15, § 6 (1859); see KAN. STAT. ANN. § 38-201 (1935).

43. ORE. LAWS, 1880, at 7, § 2; see also ORE. CODE ANN. § 33-304 (1930).

44. See e.g., OHIO REV. CODE, § 3109.03 (1972).

45. 330 U.S. 610 (1947).

46. 185 Misc. 52, 55 N.Y.S. 2d 761 (1945).

47. 269 App. Div. 1019, 59 N.Y.S. 2d 396 (1945) *aff'd*, 295 N.Y. 836, 66 N.E.2d 851 (1946).

courts of any other state could do likewise.<sup>48</sup>

The court did not consider the other questions argued: (1) whether Florida had jurisdiction over the child;<sup>49</sup> (2) whether the Florida decree of custody, lacking personal service, bound Mr. Halvey; (3) whether New York had greater power to modify the decree; (4) whether a state which has jurisdiction over the child, regardless of a custody decree rendered by another state, may make such orders regarding custody as the welfare of the child from time to time requires. These issues were reserved for decision at a later date.<sup>50</sup>

*May v. Anderson*<sup>51</sup> reached the Supreme Court on certiorari in 1953. At issue was whether or not in a habeas corpus proceeding attacking the right of the mother to retain possession of her minor children, an Ohio court must give full faith and credit to a Wisconsin decree awarding custody of the children to their father in an *ex parte* divorce action.<sup>52</sup> In an opinion written by Justice Burton, the Court replied in the negative.

The Andersons were married and lived in Wisconsin. By mutual agreement, Mrs. Anderson took the children to her home in Lisbon, Ohio, in 1946, following a family rift. Upon notification, on New Year's Day, 1947, of her intent to remain there, Anderson filed for divorce, serving defendant wife in Ohio personally. She made no appearance. He was awarded both the divorce and the custody of the children, with Mrs. Anderson receiving the right to visit them at reasonable times.

Armed with the Wisconsin decree and accompanied by a local police officer, Anderson then obtained the children from their mother in Lisbon, Ohio, and took them to his home where they ostensibly remained until 1951 when he allowed them to visit her. This time she refused to surrender them, whereupon the father sued out a writ of habeas corpus and regained their possession in the Probate Court of Columbiana County, Ohio. The action was affirmed on appeal.<sup>53</sup> The Ohio Supreme Court refused to certify the case.<sup>54</sup>

The United States Supreme Court reversed the decision, as Justice Burton declared: "Rights far more precious to appellant than property rights will be cut off if she is to be bound by the Wisconsin award of custody."<sup>55</sup> The tribunal's rationale was based on the rule that the full faith

48. 330 U.S. 610 at 614-15 (1947).

49. Under Florida law, a valid decree of child custody depends on the child being either domiciled or present on its soil. However, the child's domicile usually follows the father's. *Id.* at 613n.2. Thus Justice Jackson concurred in the result on grounds of lack of jurisdiction by the Florida court.

50. *Id.* at 615-16.

51. 345 U.S. 528 (1953).

52. It should be noted that the children were not in the state when the custody decree was awarded.

53. 91 Ohio App. 557, 107 N.E.2d 358 (Ct. App.), *appeal dismissed*, 157 Ohio St. 436, 105 N.E.2d 648 (1952).

54. 157 Ohio St. 436, 105 N.E.2d 648 (1952).

55. 345 U.S. 528, 533 (1953).

and credit clause and the act of Congress passed pursuant to it (28 U.S.C. § 1738) do not entitle a judgment in personam to extraterritorial effect if it was rendered without jurisdiction over the person sought to be bound.

Justice Frankfurter, concurring with Justice Burton, observed:

. . . Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty toward children . . . the child's welfare in a custody case has such a claim upon the State that its responsibility is obviously not to be foreclosed by a prior adjudication reflecting another State's discharge of its responsibility at another time.<sup>56</sup>

Justice Jackson voiced strong disapproval of the majority view, noting that such a "cardiac consideration" appeared to be grounded in a misapprehension between proceedings in rem and in personam, the decision ostensibly equating jurisdictional requirements for a custody decree with those for a personal money judgment. He went on to say that the assumption that in its absence a state is constitutionally impotent in the absence of personal jurisdiction of the parents to resolve questions of custody flew in the face of the Court's own cases. Prophetically, he foresaw that the decision would author new confusions which would reduce the law of custody to a rule of seize-and-run.<sup>57</sup>

*Kovacs v. Brewer*<sup>58</sup> placed before the Supreme Court the issue of what restriction, if any, the Constitution of the United States imposes on a state court when it is determining the custody of the child before it; or, more specifically: Did the federal Constitution require North Carolina to give effect to a New York child custody decree?

Petitioner Aida Kovacs and George Brewer, Jr. were married in New York City in 1945. Their daughter, Jane Elizabeth, was born in 1946. In January, 1951, Brewer was granted a divorce by a New York court which awarded custody of the child to the paternal grandfather pending the discharge of the father from the Navy. After the rendering of the decree, petitioner hid with her child. Respondent grandfather found his granddaughter and recovered possession of her on a writ of habeas corpus. He took her to his home in North Carolina, where she remained during the pendency of the appeal through the United States Supreme Court.

In 1954, after marrying one Kovacs, petitioner applied to the New York court for a change of custody, which request was granted. The grandfather refused to deliver the child to the mother, who fourteen months later in 1956, sued to recover her daughter in his home county in North Carolina. A hearing de novo resulted, with all parties present and represented. The North Carolina court determined that it did not have to give effect to the

56. *Id.* at 537-38.

57. *Id.* at 539-40.

58. 356 U.S. 604 (1958). Discussed in 44 A.B.A.J. 772 (1958).

1954 New York decree, and it denied the mother's petition. The North Carolina Supreme Court affirmed, holding that the New York decree was without extraterritorial effect, since the child had not been before it when the decree was rendered.<sup>59</sup>

The United States Supreme Court, Justice Black presiding, vacated the judgment of the North Carolina Supreme Court and remanded the cause to the lower courts to determine definitively the issue of changed circumstances, if any, between the 1954 New York decree and the filing of petitioner's suit in North Carolina. Justice Black felt that the North Carolina Supreme Court had not clarified it; but in view of the evidence below, he thought it may have intended to decide the case alternatively on that basis. He held that if North Carolina courts properly found that changed conditions showed it in the best interest of the child for custody to continue in the grandfather, then decision of the constitutional questions before the United States Supreme Court was unnecessary.<sup>60</sup>

Justice Frankfurter dissented on grounds that the implication of the majority opinion was that unless circumstances had changed since the rendering of the New York decree, it had to be given full faith and credit. He observed that the purpose of the Full Faith and Credit Clause was to preclude dissatisfied litigants from taking advantage of the federal character of the nation by relitigating issues in one state that had been decided in another. However, he deemed determining the proper custody of children to be a more important consideration than curbing litigious strife. Both the underlying purpose of the clause and the nature of custody decrees militate strongly against a constitutionally enforced requirement of respect to foreign decrees. He noted that the North Carolina Supreme Court had already declared unqualifiedly that it was not bound by the New York decree. If it was subsequently obliged to find that conditions had changed since the second New York decree in order not to be bound by it, then a fortiori the latter decree had legal significance under the Full Faith and Credit Clause. While Justice Frankfurter agreed that his Court should be rigorous in avoiding constitutional issues where a reasonable alternative exists, he thought such an issue cannot and is not avoided when a ruling is made that includes one—even though by implication. He would have affirmed the judgment of the North Carolina Supreme Court.<sup>61</sup>

*Ford v. Ford*<sup>62</sup> also dealt with full faith and credit. Litigation in regard to custody began in 1959, when the husband filed a writ of habeas corpus in a Virginia court alleging that his wife was an unfit person to keep their three children and requesting that custody be awarded to him. Mrs. Ford sought dismissal of the writ. Thereafter by mutual agreement the parties

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59. 356 U.S. 604, 609-11 (1958).

60. *Id.* at 607-08.

61. *Id.* at 609-16.

62. 371 U.S. 187 (1962). 73 YALE L.J. 134 (1963); 64 W. VA. L. REV. 427 (1962); 49 A.B.A.J. 193 (1963).

stipulated that Mr. Ford was to have custody during the school year, and Mrs. Ford during summer vacations and holidays. Notified of this, the Virginia court dismissed the case.<sup>63</sup>

Nine months later, in August, 1960, when the children were with her in Greenville, South Carolina, Mrs. Ford initiated a suit for full custody in the local juvenile court. Mr. Ford made a general appearance alleging the mother's unfitness and the prior agreement. After a plenary hearing which included the testimony of eleven witnesses, the trial judge, although finding both parents fit, held that in the best interest of the children the mother should have custody and control. He also refused to treat as res judicata the order of dismissal in the Virginia court on the issue of fitness.<sup>64</sup> The South Carolina Supreme Court subsequently reversed, its rationale being that if Mrs. Ford had instituted in Virginia courts the action she began in South Carolina, Mr. Ford could have successfully interposed the defense of res judicata. Thus, since the judgment entered by agreement in the Virginia court was res judicata in that state, it was deemed to be entitled to full faith and credit in South Carolina.<sup>65</sup>

The United States Supreme Court granted certiorari to determine whether the South Carolina Supreme Court had rested its judgment upon a proper base. Reviewing Virginia law, Justice Black cited *Mullen v. Mullen*<sup>66</sup> noting that the infant's welfare is the primary, paramount and controlling consideration of a court in all controversies over the custody of minor children and that all other matters are subordinate. Noting further that by authority of *Buchanan v. Buchanan*,<sup>67</sup> the custody and welfare of children are not the subject of barter, he believed that Virginia courts would not consider themselves bound by a mere order of dismissal, where, as here, the trial judge never saw the agreement for custody and heard no testimony upon which to base a judgment as to what would be best for the children.<sup>68</sup>

Thus, Justice Black held, consistent with the Court's prior opinion in *Halvey*,<sup>69</sup> that whatever a Virginia court could do in a case where another court had exercised its judgment before awarding custody, the South Carolina court was also free to do without preclusion by the Full Faith and Credit Clause. The South Carolina Supreme Court had clearly been in error, and the cause was reversed and remanded to it for further proceedings not inconsistent with the opinion.<sup>70</sup>

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63. 371 U.S. 187, 187-88 (1962).

64. *Id.* at 188-90.

65. *Id.* at 192-94.

66. 188 Va. 259, 49 S.E.2d 349 (1948).

67. 170 Va. 458, 197 S.E. 426 (1938).

68. 371 U.S. 187, 194 (1962).

69. 330 U.S. 610 (1947).

70. 371 U.S. 187, 194 (1962).

The consequences of these four decisions by the United States Supreme Court have been disastrous to countless children of broken homes. Child custody litigation in American courts is confused and chaotic—to use mild epithets.

### III. THEORIES OF JURISDICTION IN INTERSTATE CUSTODY-VISITATION SUITS

In refusing to enforce or recognize custody-visitation awards of sister states, courts have relied mainly on three theories: (1) the *jurisdictional defect* theory; (2) the *changed circumstances or conditions* theory; and (3) the *concurrent jurisdiction* theory.

Under the first of these, the court of the second state can re-examine the original decree because (1) the child was neither present nor domiciled in the state making the award during the pendency of the suit, and thus the decree is a nullity<sup>71</sup> or (2) both parents were not before the court (*ex parte* divorce) and thus the rights of the absent parent could not be adjudicated.<sup>72</sup>

Under the second theory, the second court, as *parens patriae* allegedly acting in the child's best interests, can reexamine the custody decree even when the child is but temporarily in the state. The foreign award is deemed *res judicata* as of the time it was entered *only*, and it is not binding on the courts of the sister state.<sup>73</sup> Although authorities have urged courts to exercise self-restraint and give due respect for foreign decrees before relitigating child custody,<sup>74</sup> some courts have reached various desired—and, at times, predetermined—results<sup>75</sup> by grasping at any straw to find a “change

71. 4 A.L.R.2d 7, 14, 25, 69 (1949); RESTATEMENT OF CONFLICT OF LAWS, § 117, 145-48 (1934); Goodrich, *Custody of Children in Divorce Suits*, 7 CORNELL L.Q. 1 (1921); Note, *Custody of Children and Conflict of Laws*, 24 HARV. L. REV. 142 (1910).

72. May v. Anderson, 345 U.S. 528 (1953); Annot. 4 A.L.R.2d 7, 71 (1921).

73. See New York *ex rel.* Halvey v. Halvey, 330 U.S. 610 (1917), wherein Justice Douglas wrote that the Constitution requires that a state shall give to the judgment of a court of a sister state only the force and effect to which it is entitled in the state where it is rendered; and if the courts of the latter state can modify a minor-child custody order or decree upon a proper showing of a change of circumstances subsequent to its rendition, the courts of another state can do likewise. *Id.* at 614. See also Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345 (1953) for the rule followed by the various states.

74. See, e.g., Kennedy v. Carman, 471 S.W.2d 275 (Mo. 1971); Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795 (1964).

75. In the case discussed note 6 *supra*, the Juvenile Court, without cause or rationale, at various hearings within a one and a half year period of time altered the three year old child's visitations, to suit the father's convenience, from two periods of 31 and 25 days to one period of 57 days; to one period of 62 days; to one period of 60 days; to one period of 30 days and two one-week periods, to one 45 day period—all in contravention of the court psychiatrist's recommendation. The court ordered the child shuttled back and forth between El Paso and Cleveland—a 2000 mile span—in spite of evidence that the child was suffering from a heart defect and in spite of the father's history of abandonment, physical

of circumstances."<sup>76</sup> To echo the words of Justice Prentice of the Connecticut Supreme Court in *Morrill v. Morrill*:<sup>77</sup> "[A] finding of changed conditions is one easily made when a court is so inclined, and plausible grounds therefor can quite generally be found. . . ."<sup>78</sup>

The third theory, ostensibly juridically launched in 1948 by Judge Traynor in the California Supreme Court decision of *Sampsell v. Superior Court*,<sup>79</sup> opened a Pandora's box of legally unbounded "discretion" to judges when it declared:

There is authority for the proposition that courts of two or more states may have *concurrent jurisdiction* over the custody of a child . . . In the interest of the child, there is no reason why the state where the child is actually living may not have jurisdiction to act to protect the child's welfare, and there is likewise no reason why other states should not also have jurisdiction.<sup>80</sup>

Judge Traynor cited an earlier legal article by Professor Stansbury:

. . . A court of any state that has a substantial interest in the welfare of the child . . . has jurisdiction to determine its custody, and this jurisdiction may exist in *two or more states at the same time* . . . . A judicial determination of custody in one state is *not binding* on the courts of a second state, . . .<sup>81</sup>

Under any of the above theories, the outcome of custody relitigation too frequently turns upon mere possession of the child—whether obtained by means of a lawful out-of-state "visitation" decree in the original suit or by abduction. The parent with the best combination of money, social prominence, and political and/or fraternal ties often has an advantage in these battles which bears no relationship to the child's best interests.<sup>82</sup>

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cruelty, mental cruelty, and other erratic conduct. The child had apparently contracted his heart ailment on the father's military tour of duty in Turkey. In ordering the child to be sent on the first visit, the judge rationalized: "If it didn't kill him to go to Turkey, it won't kill him to go to El Paso." He chose to ignore the fact that the infant had gone to Turkey with both parents; and that the father was a total stranger to his son, since he had refused to see him for 15 months, having abandoned him and the mother at Kennedy International Airport en route home from Turkey when the minor was only 2½ years old.

76. *Cook v. Cook*, 135 F.2d 945 (D.C. Cir. 1943); *Helton v. Crawley*, 241 Iowa 296, 41 N.W.2d 60 (1950); *Gilman v. Morgan*, 158 Fla. 605, 29 So. 2d 372, cert. denied, 331 U.S. 796 (1947). See also Hazard, *supra* note 2, at 392, for cases on point cited in footnotes therein.

77. 83 Conn. 479, 77 A. 1 (1910).

78. *Id.* at 492, 77 A. at 6.

79. 32 Cal. 2d 763, 197 P.2d 739 (1948). A number of previous cases had considered this possibility. See note 81 *infra*.

80. *Id.* at 778, 197 P.2d at 749 (emphasis added).

81. *Id.* at 780, 197 P.2d at 750, citing Stansbury, *Custody and Maintenance Law Across State Lines*, 10 LAW & CONTEMP. PROB. 819, 831-32 (1944) (emphasis added). See *Stafford v. Stafford*, 287 Ky. 804, 155 S.W.2d 220 (1941); *White v. Shalit*, 136 Me. 65, 1 A.2d 765 (1938); *Goldsmith v. Salkey*, 131 Tex. 139, 112 S.W.2d 165 (1938).

82. See notes 6 and 75 *supra*. In the original divorce action in that case, although the child was neither domiciled nor present on Texas soil during the pendency of the suit, alternate prerequisites under Texas law, and in contra-

Unchecked litigation and relitigation of child custody is almost always at the expense of an innocent child.

#### IV. JUDICIAL ATTEMPTS TO ALLEVIATE THE PLIGHT OF THE INTERSTATE<sup>84</sup> CHILD

##### A. Restriction of Out-of-State Visitation

##### 1. In the Original Custody Decree

As long as the child remains physically present within the custodial parent's state of domicile, a foreign state lacking personal jurisdiction over the custodial parent cannot effectively relitigate the child's custody.<sup>85</sup> By granting only in-state visitation rights to the noncustodial parent, a state can provide some protection against involving the child in interstate custody battles.

In *York v. York*,<sup>86</sup> the original custody decree gave the noncustodial parent visitation rights, but provided that she was not to remove the children from the Iowa county of the custodian's domicile. She later applied to modify the decree asking that the children be allowed to visit her in Ohio for three weeks each summer. The Iowa Supreme Court refused to modify the decree, stating that:

It is particularly hazardous to allow children permanently in the custody of a resident to be placed temporarily and from time to time in the custody of a nonresident. It not only often results in costly and lengthy litigation for the resident custodian, . . . but is conducive to "interstate bickering" over the custody of children. It is obvious such conflicts would be detrimental to the best interests of the children. . . . Thus we are not surprised at plaintiff-appellant's great concern over any modification which will in effect place the children in a foreign jurisdiction when he may be called upon to defend his custodial rights once fairly and conclusively obtained by him under the original circumstances. It is not mere whim or fictitious objections that he voices, nor a remote danger to the present peace and security of the children. . . .<sup>87</sup>

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vention of general Texas law forbidding split custody, the Texas court entered a custody-visitation decree, permitting the father, an Army colonel, who had testified that he was living in one-room bachelor officer quarters on an Army post, to have the child with him from July 1 to 31 and December 5 to 31, each year. No. 11,250, DC, Walker County, Texas.

83. See *e.g.*, *Hixson v. Hixson*, *supra* note 3, at 601.

84. This term was introduced by Professor Ehrenzweig in his article *The Interstate Child and Uniform Legislation: A Plea for Extralittigious Proceedings*, 64 MICH. L. REV. 1 (1965).

85. *May v. Anderson*, 345 U.S. 528 (1953). See pt. III of this article.

86. 246 Iowa 132, 67 N.W.2d 28 (1954). See Annot., 15 A.L.R.2d 432 (1951); Annot., 88 A.L.R.2d 148, 153 (1963); Annot., 92 A.L.R.2d 695, 717 (1963).

87. 246 Iowa at 141-42, 67 N.W.2d at 34. The court's attitude was that the limitation on visiting rights was in the child's best interests, *Id.* at 139-40, 67 N.W.2d at 32, and that, if the mother cared for the children, she would find a way to visit them in Iowa. *Id.* at 143, 67 N.W.2d at 35.



In a similar decision, *Anonymous v. Anonymous*,<sup>88</sup> an Ohio court denied a noncustodial parent's request that his eight-year-old daughter be allowed to visit him in New York. Noting the distance of travel, that the child was an innocent party to the divorce, and the possibility that the child would become involved in custody litigation in New York, the court found that "the best and most equitable arrangement" would be for the father to visit his child in Ohio.<sup>89</sup>

Although courts may limit visitation, the noncustodial parent is generally granted some form of access to the child—the rationale being that in the event of the custodian's death or incapacity, the child can make a smoother adjustment to living with a parent he had previously visited rather than one who is a stranger. In *Friedland v. Friedland*,<sup>90</sup> however, the California Court of Appeals upheld a custody decree which awarded absolute custody of a three and a half year-old son to his mother and denied the father *all* visitation rights. The mother had been given complete care, control, and custody of the child by a previous court order, after which the father was arrested and convicted for nonsupport of his son. The father had later threatened "in a vengeful manner" that he would obtain his son. The mother believed that if her former spouse were to acquire possession of the boy for even one day he would take the child beyond the court's jurisdiction. She testified that because her home had been broken into several times, she had taken the child to the home of relatives in Minnesota. The mother feared the father would harm the child.<sup>91</sup> As *Friedland* demonstrates, the right to visitation is not absolute;<sup>92</sup> the best interest of the child is controlling.

Occasionally a trial<sup>93</sup> or appellate<sup>94</sup> court will prohibit the visiting parent from removing the child from the state,<sup>95</sup> county,<sup>96</sup> or city of residence<sup>97</sup> of the custodian. This is an additional safeguard against "seize, run and sue" tactics.

## 2. Modification of the Custody Decree

Courts will consider past instances of out-of-state custody relitigation in modifying custody rights. In *MacWhinney v. MacWhinney*,<sup>98</sup> the custodial father sought and was granted a modification of his custody rights

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88. 18 Ohio Ops. 2d 282, 88 Ohio L. Abs. 398, 180 N.E.2d 205 (C.P. 1962); 88 A.L.R.2d 161, 185 (1963).

89. *Id.* at 283, 180 N.E.2d at 206.

90. 174 Cal. App. 2d 874, 345 P.2d 322 (1959); *see* 88 A.L.R.2d 207, 208, 151, 165, 205 (1963).

91. 174 Cal. App. 2d at 880, 345 P.2d at 325.

92. *Id.*

93. *Lasater v. Bagley*, 217 S.W.2d 687 (Tex. Civ. App. 1949).

94. *Paynter v. Janca*, 331 S.W.2d 814 (Tex. Civ. App. 1960).

95. *Sachse v. Sachse*, 150 So. 2d 772 (La. App. 1963).

96. *Supra* note 86. *See also* *Elkind v. Harding*, 143 N.E.2d 752 (Ohio App. 1957); *Annot.*, 95 A.L.R.2d 127 (1964).

97. Note 124, *infra*.

98. 248 Minn. 303, 79 N.W.2d 783 (1956).

to prevent his eight-year-old daughter from having to go to California for an annual visit with her mother. The mother had sued for permanent custody in California courts on the child's previous visit, had successfully overturned the prior Minnesota decree, and obtained a California decree giving her custody of the child. When the child subsequently returned to Minnesota to visit the father for the summer, the father petitioned the Minnesota courts to deprive the mother of all visitation rights. The Minnesota Supreme Court modified the original decree, restricting the mother's visits with her child to Minnesota. The modification was based upon the mother's willful violation of the original decree in refusing to return the child and resorting to the courts of another state. In denying the out-of-state visitation, the court reasoned:

. . . No young child should be made the victim of a tug of war between parents or between the courts of two conflicting jurisdictions . . . It can only lead to bitterness between the child and one or both of its parents. For this same reason, the court was justified in depriving the mother of all right to take the child from the father's home to California.<sup>99</sup>

In *Carter v. Carter*,<sup>100</sup> the husband obtained a divorce and custody of the six-year-old son on grounds of desertion in the state of Maryland. The mother was granted summer "visitation" privileges in New York. When she refused to return the child, the father instituted habeas corpus proceedings in New York, during the pendency of which Mrs. Carter secreted the child to Canada and subsequently to Connecticut, where the father regained possession of him with the help of a detective. The Maryland Court of Appeals cancelled the out-of-state "visitation" on grounds of unclean hands.<sup>101</sup> Once a noncustodial parent has demonstrated that he will subject the child to a custody fight in a foreign jurisdiction, it may be in the best interests of the child to prohibit the noncustodian from removing the child out of court's jurisdiction.

### 3. Visitation v. Split Custody

Visitation is "the right of divorced parent denied the custody of a minor child to visit such child at such times and places as the court may fix in its decree."<sup>102</sup> Custody, on the other hand, "connotes the right to establish the child's domicile and includes the elements of immediate care and direct control of the child, together with provision for its needs."<sup>103</sup> Custody is also described as including "within its meaning every element

99. *Id.* at 308, 79 N.W.2d at 687.

100. 156 Md. 500, 144 A. 490 (1929). See Annot., 88 A.L.R.2d 1273 (1963).

101. 156 Md. at 507, 144 A. at 493. See also *Brown v. Brown*, 335 Mich. 511, 56 N.W.2d 367 (1953) (father absconded with children to South Africa).

102. *BALENTINE'S LAW DICTIONARY* at 1347 (3d ed. 1969).

103. *Campbell v. Campbell*, 441 S.W.2d 658, 660 (Tex. Civ. App. 1969). See also *Selby v. Selby*, 124 N.E.2d 772 (Ohio App. 1952); *McFadden v. McFadden*, 206 Ore. 253, 292 P.2d 795 (1956); *Leithold v. Plass*, *infra* note 132.

of provision for the physical, moral, and mental well-being of the children and implies that the person having custody has the immediate personal care and control of the children."<sup>104</sup> It has been held that "these rights inherent in a custody decree are not held by one enjoying visitation rights,"<sup>105</sup> that "a decree which merely permits visitation does not authorize the visiting parent to transport the child away from its home,"<sup>106</sup> and that "the right of visitation should not be extended to the point where it becomes a divided custody or the equivalent thereof."<sup>107</sup>

In child custody disputes, a court typically awards one parent full custody and grants the other parent some form of visitation rights. There is a general reluctance to divide custody between the two parents, making each parent custodian for a part of the year.<sup>108</sup> Courts recognize that in most situations such split custody is not in the best interests of the child.<sup>109</sup> Courts do not always recognize, however, that out-of-state visitation, even though commonly granted to the noncustodial parent, often amounts to split custody. The custodial parent loses effective care and control of the child while he visits out-of-state.<sup>110</sup> The child's homelife with the custodial parent is disrupted.<sup>111</sup>

Although it did not deal with an interstate child situation, *Martin v.*

104. *Selby v. Selby*, 124 N.E.2d 772, 773-74 (Ohio App. 1952).

105. *Campbell v. Campbell*, *supra* note 103, at 660.

106. *McDermett v. McDermett*, 192 Minn. 32, 255 N.W. 247 (1934).

107. *Butts v. Butts*, 248 Ala. 431, 28 So. 2d 183 (1946); *McGetrick v. McGetrick*, 204 Ore. 645, 284 P.2d 352 (1952); *Commonwealth ex rel. Hubbell v. Hubbell*, 176 Pa. Super. 186, 107 A.2d 388 (1954); *Patrick v. Patrick*, 17 Wis. 2d 43, 117 N.W.2d 256 (1962).

108. *McLemore v. McLemore*, 346 S.W.2d 722 (Ky. App. 1961); *McFadden v. McFadden*, 206 Ore. 253, 292 P.2d 795 (1956); *Allen v. Allen*, 200 Ore. 278, 268 P.2d 358 (1954); *Bartlett v. Bartlett*, 293 S.W.2d 508 (Tex. Civ. App. 1956); *Annot.*, 92 A.L.R.2d 691, 736 (1963). In *Milim v. Mayfield*, 285 S.W.2d 852 (Tex. Civ. App. 1955), the court stated:

It has been generally held that divided custody of a child of tender years between its parents should not be permitted except under special conditions in which there is no reasonable alternative and it is made essential if not absolutely necessary.

285 S.W.2d at 854. See also *Plant, The Psychiatrist Views Children of Divorced Parents*, 10 LAW & CONTEMP. PROB. 807, 812 (1944).

109. *Richardson v. Richardson*, 72 Idaho 19, 236 P.2d 718 (1951); *McCann v. McCann*, 167 Md. 167, 173 A. 7 (App. 1937); *McDermett v. McDermett*, 192 Minn. 32, 255 N.W. 247 (1934); *Hixson v. Hixson*, 199 Ore. 559, 263 P.2d 597 (1953); *Logan v. Logan*, 176 S.W.2d 601 (Tenn. App. 1943); *Immel v. Immel*, 231 S.W.2d 732 (Tex. Civ. App. 1950); *Martin v. Martin*, 132 S.W.2d 426 (Tex. Civ. App. 1939).

110. *Dunavant v. Dunavant*, 219 S.W.2d 910 (Tenn. App. 1949).

... [S]o long as there is a divided custody there will probably be bickerings and disputes and a natural tendency on the part of the child to play one parent against the other, as well as for the claimants to seek by indulgences to curry favor with the child, if not to prejudice it against the other.

*Id.* at 915.

111. *Hetsley v. Hetsley*, 242 S.W.2d 973 (Ky. App. 1951); *Kaehler v. Kaehler*, 219 Minn. 536, 18 N.W.2d 312 (1945); *Larson v. Larson*, 176 Minn. 490, 223 N.W. 789 (1929). The court in *Dunn v. Dunn*, 217 S.W.2d 124 (Tex.

*Martin*<sup>112</sup> is the leading and most often cited case on the issue of split custody. One paragraph of Judge Alexander's opinion, frequently quoted by courts of other states, is equally applicable to interstate custody relitigation.

In our opinion, the original decree awarding the child part time to each of the parents was unwise. Certainly, no child could grow up normally when it is hawked about from one parent to the other with the embarrassing scene of changing homes at least twice each year. Such decrees are usually prompted by a laudable desire to avoid injuring the feelings of the parents, but the *net result is a permanent injury to the child* without any substantial benefit to the parents. In addition to the lack of stability in his surroundings, the child is constantly reminded that he is the center of a parental quarrel. It is readily apparent that such practices are calculated to arouse serious emotional conflicts in the mind of the child and are not conducive to good citizenship. Moreover, the parents are continuously pitted against each other in the unenviable contest of undermining the child's love for the other parent. Each parent is afraid to exercise any sort of discipline for fear of losing out in the contest. As a result, the child is reared without parental control. Such decrees by which the child is awarded part time to each of the parents have been condemned by numerous decisions.<sup>113</sup>

Many courts have spoken out against the pernicious effects of divided custody upon children. The rule of *Martin* has been followed by the various courts of Kansas,<sup>114</sup> Oregon,<sup>115</sup> Idaho,<sup>116</sup> Minnesota,<sup>117</sup> Washington,<sup>118</sup> Kentucky,<sup>119</sup> Maryland,<sup>120</sup> New Jersey,<sup>121</sup> Louisiana,<sup>122</sup> Iowa,<sup>123</sup> Arkan-

Civ. App. 1948) stated:

. . . [S]uch a condition inevitably has the effect of disturbing and confusing their lives . . . and constitutes an extreme disturbance in the serenity and orderly, methodical home-life and education which are essential in the lives of growing children and constitutes a wholesome influence on their growth and development into good citizens. To require a child to change its home twice each year and to live a portion of the year under the dominating influences of one family and the remaining portion of the year in another home and under the control and supervision of another family would constitute a continuous frustration and destroy the salutary environments in which a child ought to live. In our opinion children should never be subjected to such conditions except, possibly, in cases of extreme necessity.

*Id.* at 126.

112. 132 S.W.2d 426 (Tex. Civ. App. 1939).

113. *Id.* at 428 (emphasis added).

114. *White v. White*, 160 Kan. 32, 159 P.2d 461 (1945).

115. *Allen v. Allen*, *supra* note 4. *Hixson v. Hixson*, *supra* note 3.

116. *Richardson v. Richardson*, 72 Idaho 19, 236 P.2d 718 (1951).

117. *Larson v. Larson*, 176 Minn. 490, 223 N.W. 789 (1929).

118. *Mason v. Mason*, 163 Wash. 539, 1 P.2d 885 (1931).

119. *McLemore v. McLemore*, 346 S.W.2d 722 (Ky. App. 1961); *Towles v. Towles*, 176 Ky. 225, 195 S.W. 437 (Ct. App. 1917).

120. *McCann v. McCann*, 167 Md. 167, 173 A. 7 (Ct. App. 1934).

121. *Campbell v. Campbell*, 96 N.J. Eq. 398, 130 A. 361 (1924).

122. *Bush v. Bush*, 163 So. 2d 858 (La. App. 1964); *Holley v. Holley*, 158 So. 2d 620 (La. App. 1963).

123. *York v. York*, *supra* note 86.

sas,<sup>124</sup> Tennessee,<sup>125</sup> Florida,<sup>126</sup> Michigan,<sup>127</sup> and Mississippi.<sup>128</sup> Perhaps the minds of judges hark back to the Biblical tale of the two women each claiming to be the mother of the surviving child and Solomon's threat to cleave the infant in two with his sword.<sup>129</sup>

Some courts have restricted an out-of-state visitation on the grounds that it constituted split custody. In *In re DeFord*,<sup>130</sup> the trial court entered a decree in a divorce action, awarding custody to the father during the school year subject to the right of the mother to have her son with her in Texas during the summer. The father had the responsibility and the expenses of fetching and returning the five-year-old boy. The Supreme Court of North Carolina struck down the split custody decree on the rationale that when the child went to Texas, the power of the courts of North Carolina to exercise control over him would be ousted. The courts of Texas would acquire jurisdiction, and the decree awarding his custody to the father would be rendered wholly ineffectual:

. . . A court will not adjudicate where it cannot enforce the adjudication, or turn its suitors over to another tribunal to obtain justice, or vest the losing litigant with power to defeat the jurisdiction of the court and thus nullify the relief granted the successful suitor, or enter a decree by the very terms of which it will be divested of jurisdiction and left powerless to compel obedience. . . .

Hence, in a proceeding of this nature, in the absence of unusual circumstances, a court should not enter an order which permits the infant to be removed from the state by one to whom unqualified custody has not been awarded.<sup>131</sup>

The dividing line between custody and visitation is indistinct. In *Leithold v. Plass*,<sup>132</sup> the Supreme Court of Texas held that a two-week sojourn by the minor son with the adoptive father in California, in lieu of one-day visits in the adoptive mother's Texas home, constituted a modification of visitation rights rather than an award of split custody. The court felt that two weeks out of the state was a *visitation*. In *Leaverton v. Leaverton*,<sup>133</sup> on the other hand, the Dallas Court of Civil Appeals refused a noncustodial father's request that his nine-year-old daughter be sent from Alabama to Texas to visit him for two weeks one year and four weeks in

124. *Sindle v. Sindler*, 229 Ark. 209, 315 S.W.2d 893 (1958); *Aaron v. Aaron*, 228 Ark. 27, 305 S.W.2d 550 (1957).

125. *Dunavant v. Dunavant*, 31 Tenn. App. 634, 219 S.W.2d 910 (1949); *Rowles v. Reynolds*, 29 Tenn. App. 224, 196 S.W.2d 76 (1946).

126. *Phillips v. Phillips*, 153 Fla. 133, 13 So. 2d 922 (1943).

127. *Vines v. Vines*, 344 Mich. 222, 73 N.W.2d 913 (1955).

128. *Brocato v. Walker*, 220 So. 2d 340 (Miss. 1969).

129. 1 *Kings*. 3:16-3:28.

130. 226 N.C. 189, 37 S.E.2d 516 (1946).

131. *Id.* at 192, 37 S.E.2d at 517-18. See also *King v. King*, 202 Ga. 838, 44 S.E.2d 791 (1947).

132. 413 S.W.2d 698 (Tex. 1967).

133. 417 S.W.2d 82 (Tex. Civ. App. 1967).

subsequent years. The father contended that he was merely clarifying existing visiting rights.<sup>134</sup> The court considered his request an attempt to modify the original custody decree without showing changed circumstances.<sup>135</sup> *Leithold* was distinguished on the basis that it involved a period of only two weeks.<sup>136</sup> Apparently the court in *Leaverton* thought that four weeks constituted split custody, while two weeks amounted to visitation.<sup>137</sup>

### B. Bonding

A instrument commonly used by the courts to discourage further litigation by a nonresident parent granted permission to remove the child temporarily beyond the court's jurisdiction is to impose a bond upon him or her, conditioned upon the faithful performance of the terms of the order and the return of the child to the domicile.<sup>138</sup> The danger here lies, as was pointed out in *Page v. Page*,<sup>139</sup> in that, while a bond may possibly secure the payment of damages, it may not produce the child. At present day prices and costs of services, a minimum of \$10,000 would be necessary to meet expenses of attorneys, court costs, detectives, and transportation to recover the child. Usually, however, such bonds are set at \$500<sup>140</sup> or \$1,000.<sup>141</sup>

## V. SOLUTIONS TO THE PROBLEMS

### A. The Texas Rule

While various panaceas to interstate child custody relitigation have been proposed, thus far only one jurisdiction has approached a workable solution. Texas alone has established the rule that modification of a custody decree is governed by the law of venue.<sup>142</sup> The action—considered new and independent of the divorce decree—must be brought in the county where

134. *Id.* at 85.

135. *Id.*

136. *Id.* at 86.

137. In *McFarland v. Boyd*, 431 S.W.2d 41 (Tex. Civ. App. 1968), the trial court modified a New Mexico divorce decree by giving the father the right to have his twelve-year-old son and ten-year-old daughter visit him in Nebraska for two weeks each summer in lieu of his visiting them at their mother's residence in Amarillo. The appeals court considered itself bound by *Leithold* and accordingly affirmed.

138. See New York *ex rel. Halvey v. Halvey*, *supra* note 9. Commonwealth *ex rel. Warner v. Warner*, 156 Pa. Super. 465, 40 A.2d 886 (1945). See also *Sanders v. Sanders*, 63 Wash. 2d 709, 388 P.2d 942 (1964); Annot., 15 A.L.R.2d, §§ 11-13 (1951); 24 AM. JUR. 2d *Divorce and Separation* § 782 (1966).

139. 166 N.C. 90, 81 S.E. 1060 (1914). See also *Harris v. Harris*, 115 N.C. 587, 20 S.E. 187 (1894).

140. *Leithold v. Plass*, 413 S.W.2d 698, 700 (Tex. 1967); Annot., 92 A.L.R.2d 695 (1963); Annot., 15 A.L.R.2d 432 (1951).

141. See cases cited at Annot., 15 A.L.R.2d 432 (1951).

142. *Spell v. Green*, 144 Tex. 535, 192 S.W.2d 260 (1946); *Lahey v. McCarroll*, 134 S.W.2d 1016 (Tex. 1940); *Ellington v. Floyd*, 255 S.W.2d 948 (Tex. Civ. App. 1953).

the custodian and child reside. Case law is unclear whether a Texas court having personal jurisdiction over the parents can confer a custody-visitation award as part of the divorce decree where the child is neither domiciled nor present on its soil during the pendency of the suit.<sup>143</sup>

### B. *The Uniform Child Custody Jurisdiction Act*

Fully cognizant of the evils flowing from interstate custody litigation and disheartened that neither the United States Congress nor Supreme Court were demonstrating any propensity toward alleviating the plight of the interstate child, the Commissioners on Uniform State Laws adopted in July, 1968, the Uniform Child Custody Jurisdiction Act, which was approved by the American Bar Association the following month.<sup>144</sup>

The Act is an attempt to bring some semblance of order into the now existent chaos. The avowed purposes in section 1 are to:

- (1) avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;
- (2) promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child;
- (3) assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training, and personal relationships is most readily available, and that the courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state;
- (4) discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;
- (5) deter abductions and other unilateral removals of children undertaken to obtain custody awards;
- (6) avoid re-litigation of custody decisions of other states in this state insofar as feasible;
- (7) facilitate the enforcement of custody decrees of other states;
- (8) promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child; and
- (9) make uniform the law of those states which enact it.<sup>145</sup>

Section 2 consists of definitions of terminology peculiar to child "custody proceedings," which is broadly defined to include divorce and separa-

143. Cf. *DeLaughter, v. DeLaughter*, 370 S.W.2d 207, 208 (Tex. Civ. App. 1963), wherein it was said that alternate prerequisites for a court to have jurisdiction to enter a custody decree are domicile or presence of the child on Texas soil.

144. National Conference of Commissioners on Uniform State Laws, *UNIFORM CHILD CUSTODY JURISDICTION ACT* (1968). Bodenheimer, *supra* note 9, at 1216.

145. *UNIFORM CHILD CUSTODY JURISDICTION ACT* § 1, at 7.

tion, child neglect, dependency, habeas corpus, guardianship, and related actions.

The nub of the Act is found in section 3, which establishes two major bases for jurisdiction empowering a court to initially enter or modify a custody decree: (1) the court of a child's "home state" has jurisdiction; or (2) if there is no "home state" or if the child and his family have equal or stronger ties with another state, a court of that state has jurisdiction.<sup>146</sup> Any concurrent jurisdiction under these tests is to be resolved by Sections 6 and 7—which provide that courts are expected to ferret out information about any other custody proceedings concerning the same child. They then shall, by mutual agreement, yield to the "appropriate forum." This later phrase apparently means that if courts of more than one state have jurisdiction over the child, the priority in time principle shall prevail unless preempted by the inconvenient forum principle.<sup>147</sup> The nebulousness of the term ostensibly is to be left for resolution by "consultation and cooperation" among the courts in accordance with some guidelines for determining the inconvenient forum issue and correct proceedings after its determination.<sup>148</sup>

"Home state" is a variation of the "established home" concept introduced by Professor Ratner.<sup>149</sup> It is defined as—

the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least 6 consecutive months, and in the case of a child less than 6 months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the 6-month or other period.<sup>150</sup>

In cases of abandonment or other emergencies such as abuse, provision is made for a state in its capacity as *parens patriae* to assume jurisdiction over a child physically present within its borders in order to provide it with immediate protection. Neglect alone, however, will not give rise to such jurisdiction.<sup>151</sup> If no other court can or has assumed jurisdiction under the previous subsections, a court so petitioned may—if it is in the best interest of the child.<sup>152</sup>

Physical presence of the child and *one* parent in the state is not enough to confer jurisdiction on the court, except in the last two instances.<sup>153</sup> Physical presence of the child is also not a prerequisite for jurisdiction to determine his custody.<sup>154</sup>

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146. *Id.*, Commissioner's Note, § 3.

147. *Id.*, Commissioner's Note, § 6.

148. *Id.*, Commissioner's Note, § 7.

149. Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795, 815-16 (1964).

150. UNIFORM CHILD CUSTODY JURISDICTION ACT § 2(5) (1968).

151. *Id.*, Commissioner's Note, § 3(a) (3).

152. *Id.*, § 3(a) (4).

153. *Id.*, § 3(b).

154. *Id.*, § 3(c).



The Act next provides reasonable notice and opportunity to be heard to contestants, parents whose rights have not been previously terminated, and any person who has physical custody of the child.<sup>155</sup> In the case of nonresidents, notice may be either by personal service or by certified mail with return receipt.<sup>156</sup> Publication in lieu of other means is precluded. If a person submits to the jurisdiction of the court, notice is not required.<sup>157</sup>

The Act also embodies the "clean hands" doctrine. One who has abducted a child from another state or has indulged in other reprehensible conduct may not enlist the aid of a court in modifying the extant custody decree of another state.<sup>158</sup> Unfortunately, the declinature by the court is *permissive* and not mandatory; the court may decline to exercise jurisdiction when "just and proper under the circumstances."<sup>159</sup> This section also imposes a penalty upon an errant petitioner. The court dismissing his complaint can dun him for its court costs, travel expenses, and attorney fees incurred by other parties and their witnesses.<sup>160</sup>

The initial pleading in a custody proceeding under the Act must be made under oath.<sup>161</sup> It must state the child's address and the names of his guardians for the past five years. The affiant must also list all prior custody proceedings involving the same child, whether other such proceedings pend in another state, and whether other individuals not joined as parties defendant have an interest in the child.<sup>162</sup> If the court ascertains that a person not joined in the suit has physical custody or claims to have custody or visitation rights with respect to the child, it must order his joinder as a party defendant and notify him thereof.<sup>163</sup> If such person is a non-resident, service is made upon him as previously noted.<sup>164</sup> This section seeks to prevent relitigation of custody by claimants other than parents.

The court may order any party to the proceeding who is within the state to appear personally before it. It may order the custodian to appear with the child. It may order a nonresident to appear personally with or without the child, with a *caveat* that failure to obey may result in a decision adverse to the defaulter. It may also order the expenses of the non-resident and the child paid by another party, through the court registry, if circumstances make it just and proper.<sup>165</sup>

Any custody decree rendered in accordance with the terms of the Act by a court of competent jurisdiction binds all parties who have been served,

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155. *Id.*, § 4.

156. *Id.*, § 5.

157. *Id.*, § 5(d).

158. *Id.*, § 8(a).

159. *Id.*, § 8(a).

160. *Id.*, § 8(c).

161. *Id.*, § 9(a).

162. *Id.*

163. *Id.*, § 10.

164. *Id.*, § 5.

165. *Id.*, § 11.

notified, or who have made an appearance in the proceeding and have been given an opportunity to be heard.<sup>166</sup> The decree is conclusive on all issues of law and fact determined. Since a custody decree is normally subject to modification in the interest of the child upon a showing of a material change of circumstances, it does not have absolute finality. As long as it has not been altered, however, it is binding as a final judgment.

The key to the entire Act is section 13. It requires a state to recognize and enforce the custody decrees of a foreign state which had assumed jurisdiction under the provisions of the Act or under circumstances satisfying the Act's provisions. In effect, it declares that full faith and credit must be given a valid out-of-state decree if due process requirements of notice and opportunity to be heard have been met. Personal jurisdiction over the defendant is not necessary.<sup>167</sup> Conceivably, if the prior modified decree is a punitive or disciplinary one, courts in other states might be reluctant to recognize and enforce it. This problem could be alleviated by enforcement of the visitation provisions of the original decree, or if conditions change materially, by a petition for their modification.<sup>168</sup>

A sister state may not modify a custody decree unless the former state no longer has jurisdiction, or if it has declined to assume jurisdiction to modify the decree and the second state court has jurisdiction within the purview of the Act.<sup>169</sup> In other words, a court's jurisdiction continues in effect only as long as the requisite jurisdictional standards of the Act are met. When modifying a foreign decree, a court must give due consideration to the documents and records of the former one, in order to be as fully informed as possible before entering a decision. What constitutes "due consideration" is a matter of discretion and local law.<sup>170</sup>

A certified copy of a custody decree of a sister state may be filed with the clerk of the appropriate court of any other state, where it shall have the same effect and be enforced in the same manner.<sup>171</sup> Violation of the decree may subject the wrongdoer to all necessary expenses incurred in its enforcement by the wronged party.<sup>172</sup> It should be noted, however, that enforcement and modification are not synonymous. A petition for modification must be addressed to the same court where the decree is being filed. Likewise enforcement is not mandatory; it may be stayed if there is danger of abuse or mistreatment of the child.<sup>173</sup>

The clerk of each state court is required to maintain a registry in which he shall file certified copies of custody decrees of sister states, com-

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166. *Id.*, § 12.

167. *Id.*, Commissioner's Note, § 13.

168. *Id.*

169. *Id.*, § 14.

170. *Id.*

171. *Id.*, § 15(a).

172. *Id.*, § 15(b).

173. *Id.*, Commissioner's Note, § 15.

munications concerning findings of inconvenient forum of sister states, and other documents concerning custody proceedings from sister states which may affect later custody actions.<sup>174</sup> The purpose of this section of the Act is to compile a complete case history of the child's custody in a single place.<sup>175</sup> The same clerk may forward certified copies of his court's decree to other courts or to interested parties.<sup>176</sup>

Section 18 allows any party to a custody suit to utilize depositions, written interrogatories, and other discovery devices to adduce testimony of witnesses, parties, or children involved in another state. The procedural rules of the state where the materials are to be used control the discovery.<sup>177</sup> In addition, the section authorizes the court *sua sponte* to gather any out-of-state evidence which it deems necessary and proper to convey a true picture of the child's circumstances, prescribing the manner and the terms under which it shall be taken.<sup>178</sup>

In a unique provision the Act enables a court of one state to request the appropriate court of another state to hold a hearing to gather evidence or to hold an investigation with respect to the child's custody and forward certified copies of the results to it, with costs taxed against the parties to the litigation or against the originating state.<sup>179</sup> The court may also request the appropriate court of another state to order its resident party to appear in custody proceedings in the former one with the child, making monetary provisions for such appearance at its discretion. This makes possible an organized network of contempt power; however, the section is permissive in nature.<sup>180</sup> The provisions of section 19 are reciprocated in section 20, which empowers local courts to aid out-of-state courts in a like manner.<sup>181</sup>

The clerk of courts is further authorized to preserve pleadings, orders and decrees, and other pertinent documents until the child reaches the age of 18 or 21; and upon the request of the court of another state, he shall forward certified copies of any or all such papers to it.<sup>182</sup>

Section 23 extends the general policies of the Act beyond national borders provided that the foreign country's custody decree was rendered by appropriate authorities and that reasonable notice and opportunity to be heard was given to all persons affected by the decree.<sup>183</sup>

Finally, an optional section of the Act provides that when an issue of existence or exercise of jurisdiction by a court is raised, it shall be given court calendar priority and handled expeditiously in order to keep at a

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174. *Id.*, § 16.

175. *Id.*, Commissioner's Note, § 16.

176. *Id.*, § 17.

177. *Id.*, Commissioner's Note, § 18.

178. *Id.*, § 18.

179. *Id.*, § 19(a).

180. *Id.*, Commissioner's Note, § 19.

181. *Id.*, § 20.

182. *Id.*, § 21.

183. *Id.*, § 23.

minimum the duration of the period of uncertainty and turmoil in a child's life.<sup>184</sup>

While there is much of value in the Uniform Child Custody Jurisdiction Act, many of its provisions are impracticable and naive when considered in the contemporary light of the American court scene. It lacks explicit standards and guidelines for *all* judges to follow in reaching custody-visitation decisions. Misuse of the "priority in time"<sup>185</sup> and "inconvenient forum"<sup>186</sup> rules could result in highly subjective jurisdictional decisions which would further encourage "seize and sue" tactics by contesting parents. Another problem is the expense involved in implementing the record keeping and discovery provisions of the Act.

The most important failing of the Act lies in the states' delay in enacting it into law. The Act has been in existence six years; yet only five states have adopted it.<sup>187</sup> The Act will never be effective unless a substantial number of states enact it as state law.

### C. The Writer's Solution

In the opinion of this writer, the solution to interstate custody relitigation lies in a federal statute requiring that in any action whatsoever concerning custody and/or visitation of a minor child—be it an original divorce action or an application to modify—venue must lie in the county of the domiciliary custodian of said child (*i.e.*, an embodiment of the Texas rule on a national scale).<sup>188</sup> When a marriage disintegrates, inevitably the children remain with one parent. Only the state court where that parent is domiciled or resides would be empowered to enter a custody-visitation decree. Since procedural rules of most—if not all—states provide for venue in civil actions in the county of defendant's residence, the statute would not play havoc with established procedural rules. The statute would be in the "best interests of the child."

Jurisdiction over the child would change as the permanent custodian found it necessary to move for cogent and compelling reasons. The custodian would register his custody decree with the appropriate new state court and request that the child be declared its ward; or, in the alternative, the registration could effect this automatically, to spare the custodian added unnecessary legal expense. Any petitions for modification of the

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184. *Id.*, § 24.

185. *Id.*, § 6(c).

186. *Id.*, § 7(a).

187. CAL. CIV. CODE §§ 5150-74 (West Supp. 1974); COLO. REV. STAT. ANN. §§ 46-6-1-46-6-26 (Supp. 1973); HAWAII REV. STAT. §§ 583-1 to -26 (Supp. 1973); N.D. CENT. CODE §§ 14-14-01 to -26 (1971); WYO. STAT. ANN. §§ 20-143 to -167 (Supp. 1973).

188. Congress arguably has power to enact this type of legislation pursuant to its power to enforce the due process clause of the fourteenth amendment, *see* Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795, 827n.153 (1964), or its broad powers under Article I, § 7, to regulate interstate commerce.

decree would be addressed to this court, and it would subject all parties involved to a thorough investigation. Failure on the part of an indispensable party to cooperate would result in a ruling adverse to him or her. In the event of the death of the child's custodian, jurisdiction to enter a modified custody decree would still be in the court where the child is domiciled. Wardship would subsequently be transferred, if necessary, to the domiciliary court of the new custodian.

To stem the evils of split custody, the court having jurisdiction should consider the following guidelines: Visitations for children under twelve would be limited to the county of the custodian's residence, with liberal privileges accorded the noncustodian—as long as they do not interfere with the well-being of the minors and do not disrupt the tranquility of their home. Out-of-state or out-of-town visits for children over twelve would be subject to the individual child's wishes, to be determined by *separate* conferences with (1) a qualified nonpartisan referee appointed by the court and approved by *both* parties; (2) a child psychiatrist, psychologist, or family doctor; and (3) a teacher or minister who is acquainted with the child and has its respect and confidence. Their *individual* reports would be available to both parties as well as to the courts.

## VI. CONCLUSION

The status of custody-visitation litigation in the United States is a hideous, cancerous chancre on the body of American jurisprudence. Each time a child crosses a state line, his custody is subject to relitigation by the noncustodial parent. What is perpetrated by our courts upon the innocent "interstate child" is often not in his "best interests."

A prerequisite to custody relitigation is possession of the child, whether legal or illegal. Usually the noncustodian gains possession through a grant of visitation in the divorce decree. Judges commonly send infants beyond the borders of their home state on "visitations," even though they sometimes last several months and amount to split custody. American courts have suited the convenience and desire of the noncustodial parent, while sacrificing the well-being of children, as an inducement to him to pay child support regularly and thus keep his issue off the welfare rolls.<sup>189</sup> In the words of Justice Jackson of the United States Supreme Court, dissenting in *May v. Anderson*: "A state of law such as this, . . . has little to commend it in legal logic or as a principle of order in a federal system."<sup>190</sup>

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189. Plant, *The Psychiatrist Views Children of Divorced Parents*, 10 LAW & CONTEMP. PROB. 807, 812 (1944).

Our experience has been that undue importance has been given to the factor of support and the rights it entails . . . Could we turn our faces towards decisions that boldly consider the rights of the children . . .

*Id.* at 817.

190. *May v. Anderson*, 345 U.S. 528, 539 (1953).

The Uniform Child Custody Jurisdiction Act, approved by the American Bar Association in 1968, has fallen short of its desired goal—the cessation of a multiplicity of suits in regard to one child's custody. Its provisions are cumbersome and unpracticable. Its loopholes could perpetuate some of the very evils it is seeking to alleviate.

Immediate corrective steps must be taken to remedy the vicious interstate warfare waged by parents over the custody of their children. All custody-visitation actions should be subject to the law of venue in the local court of the domiciliary or resident custodian. The crisis of stemming relitigation of a child's custody can only be met by positive action, making Justice Jackson's pronouncement in *May v. Anderson*—"children as well as the home keeping parent [have the right] to have their status determined with reasonable certainty, and to be free from an incessant tug of war between squabbling parents"<sup>191</sup>—a reality, at long last.

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191. *Id.* at 542.

